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No. 95-1594

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BARBARA A. DE BUONO, M.D., in her capacity as New York State Commissioner of Health; KAREN SCHIMKE, in her capacity as New York State Executive Deputy Commissioner of Health; DEPUTY DIRECTOR, Division of Health Care Financing, Office of Health Systems Management, New York State Department of Health,

Petitioners,

vs.

NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND, by its Trustees, JOHN BOWERS, JAMES CAPO, FRANK LONARDO, WILLIAM P. LYNCH, M. BRIAN MAHER, JAMES P. MELIA, GERALD OWENS and PETER VICKERS,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Rule 29.6 Statement

In accordance with Sup. Ct. R. 29.6, respondents state that none of them has a corporate parent, subsidiary, or affiliate.

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On Petition For A Writ Of Certiorari
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RESPONDENTS' BRIEF IN OPPOSITION

Introduction

Petitioners ask this Court to entertain review of a circuit court's decision on remand that reconsidered and reaffirmed its earlier determination in the wake of an intervening decision of this Court. They quibble with the correctness of the Second Circuit's application of this Court's recent decision in

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671 (1995), *rev'g* 14 F.3d 708 (2d Cir. 1994) (hereinafter "*Travelers*"), to the factual context presented by this case. Flyspecking remand decisions of federal courts of appeals does not qualify as the type of special and important function that warrants the exercise of certiorari jurisdiction, *see* SUP. CT. R. 10, since this Court does not sit as a court of errors and appeals to pass judgment on every determination of inferior tribunals. The Second Circuit's decision in this case is eminently sound and perfectly compatible with the law of ERISA pre-emption articulated by this Court not only in *Travelers* but also in the long line of decisions that preceded it. Review by this Court, therefore, is unwarranted. The petition for certiorari should be denied.

Statement of the Case

This case involves the imposition by the State of New York pursuant to N.Y. PUB. HEALTH LAW § 2807-d (McKinney 1993 & Supp. 1996) of a tax upon contributions and payments for medical benefits provided to plan beneficiaries, which are paid to medical clinics operated in New York by an employee welfare benefit plan. The court of appeals previously ruled that this New York tax was pre-empted by the Employee Retirement Income Security Act ("ERISA"). *See NYSA-ILA Medical & Clinical Serv. Fund v. Axelrod*, 27 F.3d 823 (2d Cir. 1994) (hereinafter "*Axelrod*"). On May 1, 1995, this Court granted certiorari, vacated the prior *Axelrod* decision, and remanded the case for further consideration in light of the *Travelers* decision. *See Chassin v. NYSA-ILA Medical & Clinical Serv. Fund*, 115 S. Ct. 1819 (1995).

Travelers

Travelers involved a challenge by a group of commercial insurance carriers and their trade association to invalidate New York's system of imposing surcharges on hospital bills paid by commercial insurers and Health Maintenance Organizations but not on hospital bills paid by Blue Cross/Blue Shield insurers. *Travelers*, 14 F.3d at 712. The surcharge scheme was designed to enhance artificially the

competitiveness of the latter group of insurers *vis-à-vis* the former. The Second Circuit had concluded that ERISA § 514, 29 U.S.C.A. § 1144 (West 1985 & Supp. 1996),[1] pre-empted New York's hospital rate-setting system because that state law (1) purposely interfered with the choices ERISA plans make for health care coverage and (2) substantially increased the cost to ERISA plans of providing health care benefits to their beneficiaries. *Id.* at 719-20. The court of appeals found that the hospital rate-setting system in *Travelers* related to ERISA plans, the statutory touchstone for pre-emption, because it had a connection with ERISA plans.[2]

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[1] In 1974 Congress enacted ERISA, a comprehensive regime to protect the interests of employees and their beneficiaries in private employee benefit plans. *Shaw v. Delta Air Lines*, 463 U.S. 85, 90 (1983); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990); *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 127 (1992). ERISA's "crowning achievement" was the elimination of state regulation of ERISA plans. *Shaw*, 463 U.S. at 99. Congress fostered this objective by adopting a "deliberately expansive" express pre-emption clause, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), that is "conspicuous for its breadth," *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). The clause, ERISA § 514(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C.A. § 1144(a) (West 1985).

[2] The controlling test for determining whether a state law meets the "relate to" standard of ERISA § 514(a) is simple and direct: every state law that has a connection with or reference to an ERISA employee benefit plan relates to that plan and is pre-empted, whatever the state law's underlying purpose and intent. *Greater Wash. Bd. of Trade*, 506 U.S. at 129-130; *FMC Corp.*, 498 U.S. at 58-59; *Shaw*, 463 U.S. at 96-97. The "relate to" standard must be interpreted broadly, *see Shaw*, 463 U.S. at 98; it must be given a "broad common sense meaning," *see Ingersoll-Rand*, 498 U.S. at 139. The "relate to" touchstone does not limit ERISA pre-emption only to state laws specifically designed to regulate the terms and conditions of employee benefit plans or those dealing with the subjects of regulatory concern covered by ERISA — reporting, disclosure, fiduciary responsibility, and the like. *Ingersoll-Rand*, 498 U.S. at 137-39; *Shaw*, 463 U.S. at 98. Pre-emption prevails even if the state law is not specifically designed

(Footnote continued)

The connection in *Travelers*, however, was indirect because the surcharges were imposed not upon ERISA plans themselves but upon insurance carriers providing health insurance coverage to the plans and their beneficiaries. It was this indirect feature which prompted this Court to reverse the Second Circuit's determination. This Court concluded that "a law operating as an indirect source of merely economic influence on administrative decisions [by ERISA plans], as here, should not suffice to trigger pre-emption . . . ." *Travelers*, 115 S. Ct. at 1680.

It would appear that *Travelers* may have "reconfigured the landscape for ERISA preemption." *New England Health Care Union, District 1199 v. Mount Sinai Hospital*, 65 F.3d 1024, 1029 (2d Cir. 1995).[3] The Court eschewed any strict reliance on the conspicuously broad "relate to" test found in ERISA's pre-emption provision. "We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress

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to affect ERISA plans or the state law's connection, reference, or effect is only indirect, *see Greater Wash. Bd. of Trade*, 506 U.S. at 129-130; *Ingersoll-Rand*, 498 U.S. at 139; *Pilot Life*, 481 U.S. at 47-48, or the state law is "consistent with ERISA's substantive requirements," *see Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985).

[3] Since the *Travelers* Court expressly acclaimed its "fidelity to the views expressed in our prior opinions on the matter [of ERISA pre-emption]," *see* 115 S. Ct. at 1683 (citations omitted), it is debatable whether *Travelers* signals a lasting change in the Court's ERISA pre-emption jurisprudence or merely a temporary, but expedient, digression designed only to achieve the policy objective of preserving the integrity of state hospital rate-setting endeavors. *See* 115 S. Ct. at 1681-82. A paraphrase of Circuit Judge Ralph K. Winter's remark in another case is brought to mind: "I hope that all further references to this decision will be accompanied by the words, 'That case is easily distinguishable; it involved . . . [hospital rate-setting]'"! *United States v. International Bhd. of Teamsters*, 948 F.2d 98, 111 (2d Cir.) (Winter, J., dissenting), *vacated as moot*, 113 S. Ct. 31 (1992).

understood would survive." *Travelers*, 115 S. Ct. at 1677. Analysis of ERISA's legislative history led the Court to conclude that "[t]he basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* at 1677-78. So long as the state law does not require "mandated employee benefit structures or their administration," establish "alternate enforcement mechanisms," or "preclude uniform administrative practice or the provision of a uniform interstate benefit package," it does not give rise to "those 'conflicting directives' from which Congress meant to insulate ERISA plans." *Id.* at 1678, 1679, 1680 (citations omitted).

The key analytical tool for determining ERISA pre-emption, in the *Travelers* Court's view, is the intent of Congress, as expressed in the language of the pre-emption provision and its legislative history.

> While Congress's extension of pre-emption to all "state laws relating to benefit plans" was meant to sweep more broadly than "state laws dealing with the subject matters covered by ERISA[,] reporting, disclosure, fiduciary responsibility, and the like," nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern.

Id. at 1680 (citations omitted). In reaching this conclusion, the *Travelers* Court was impressed by other Congressional enactments adopted after ERISA's passage, some by the same Congress, which were simply incompatible with ERISA pre-emption of state legislation regulating hospital rate-setting. *See id.* at 1681-82 & n.6.

Against this analytical backdrop the *Travelers* Court ruled that the New York surcharge laws, which have "only an indirect economic effect on the relative costs of various health insurance packages . . . [and] leave plan administrators right where they would be in any case, with the responsibility to

choose the best overall coverage for the money . . . do not bear the requisite 'connection with' ERISA plans to trigger pre-emption." *Id.* at 1680. In the Court's view, the indirect economic effects of the challenged surcharge laws do not regulate any ERISA plan itself because they do not bind plan administrators to any mandated choice nor preclude any uniform administrative practice or uniform interstate benefit package. *Id.* at 1679. An indirect economic influence "simply bears on the costs of benefits and the relative costs of competing insurance to provide them. It is an influence that can affect a plan's shopping decisions, but it does not affect the fact that any plan will shop for the best deal it can get, surcharges or no surcharges." *Id.* at 1679.

Post-*Travelers* Decisions of the Courts of Appeals

The *Travelers* Court prescinded from the question whether the surcharge statute was pre-empted by ERISA insofar as it applies to self-insured funds. *Id.* at 1675 n. 4.[4] In the wake of *Travelers*, the Second Circuit and four other circuits had occasion to consider the ramifications of the *Travelers* ruling on the law of ERISA pre-emption.[5] None of these cases broke

[4] The Court's approach was consistent with the views expressed in the brief filed in *Travelers* by the United States at the Court's request. It was the indirect effect of the surcharge statute in *Travelers* which led the United States to recommend the issuance of a writ of certiorari in *Travelers* to enable the Court to decide the question whether ERISA pre-empts state laws "of general applicability that have only an indirect, economic effect on ERISA plans." Brief for United States As Amicus Curiae at 8, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (filed Sept. 1994). The United States acknowledged that the direct application of state law to ERISA plans would present entirely distinct issues not present in *Travelers*. *Id.* at 14-15

[5] *See Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561 (2d Cir. 1995); *Connecticut Hospital Ass'n v. Weltman*, 66 F.3d 413 (2d Cir. 1995); *New England Health Care Union, District 1199 v. Mount Sinai Hospital*, 65 F.3d 1024 (2d Cir. 1995); *NYS Health Maintenance Organization Conference v. Curiale*, 64 F.3d 794 (2d Cir. 1995); *Travelers Ins. Co. v. Pataki*, 63 F.3d 89 (2d Cir. 1995), *on remand from* 115 S. Ct. 1671

(Footnote continued)

any new ground. State laws, like the surcharge statute at issue in *Travelers*, involving indirect economic effects on ERISA plans were saved from pre-emption; prevailing wage laws and death benefit laws having more immediate impacts upon ERISA plans were not.

The panels in three of the Second Circuit post-*Travelers* cases had occasion to comment on the prior *Axelrod* decision in this case, but their observations shed little light on whether the *Axelrod* decision retained its vitality in light of *Travelers*. All three panels seemed to be impressed by this Court's order vacating the prior decision in *Axelrod*, *see Weltman*, 66 F.3d at 415; *New England Health Care*, 65 F.3d at 1030, 1034; *Travelers-II*, 63 F.3d at 94 — a misplaced reliance, since vacatur is an unremarkable phenomenon that has no precedential value.[6]

One of the three panels properly refrained from predicting whether the Second Circuit's prior *Axelrod* decision in this case "remains good law." *See Weltman*, 66 F.3d at 415. Another, however, could not resist the temptation to resort to the

(1995) (hereinafter "*Travelers-II*"); *O'Shea v. First Manhattan Co. Thrift Plan*, 55 F.3d 109 (2d Cir. 1995); *Thiokol Corp. v. Roberts*, 76 F.3d 751 (6th Cir. 1996); *Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3623 (Mar. 18, 1996) (U.S. No. 95-1163); *ABC Nat'l Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343 (9th Cir. 1995); *Safeco Life Ins. Co. v. Musser*, 65 F.3d 647 (7th Cir. 1995).

[6] This Court's vacatur and remand for further reconsideration in light of an intervening ruling by the Court is neither an adjudication on the merits nor an indication of this Court's sentiments. It represents adherence to the time-honored and routine practice of giving the circuit court the first crack at re-examining the case because this Court itself is "not certain that the case was free from all obstacles to reversal on an intervening precedent" and is not prepared at that juncture to address the merits. *See Henry v. City of Rock Hill*, 376 U.S. 776, 776-77 (1964) (*per curiam*) (citations omitted); *see also United States v. National Soc'y of Professional Eng'rs*, 404 F. Supp. 457, 459 & n.2 (D.D.C. 1975), *aff'd in part & remanded in part*, 555 F.2d 978, 982 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978).

gratuitous obiter dictum that "in the wake of *Travelers* (and the Court's decision to vacate *NYSA-ILA*), we question whether we should continue to distinguish between laws that directly deplete ERISA plans' assets and laws that only indirectly do so." *See Travelers-II*, 63 F.3d at 94. But only the circuit court panel in this case, which had the benefit of both the pertinent record evidence and the views of those with a stake in the outcome of the controversy, was in a position to provide an informed answer to this question.

Decision Below

The answer given was short and to the point: "Upon reconsideration in light of the Supreme Court's holding in *Travelers*, we conclude that the ground upon which our earlier decision in this case rested remains undisturbed." *Axelrod*, 74 F.3d at 30. It took the court of appeals less than a page of analysis to reason that the *Travelers* decision of this Court, which limited its holding to "a law operating as an *indirect* source of merely economic influence on administrative decisions [by ERISA plans]," *see id.* at 30 (citing *Travelers*, 115 S. Ct. at 1680) (emphasis supplied), does not support shielding from ERISA pre-emption a statute like the New York tax at issue in this case which "depletes the Fund's assets *directly*, and thus has an immediate impact on the operations of an ERISA plan." *Id.* at 30 (emphasis supplied). Consequently, the court of appeals concluded that "[n]othing in *Travelers* undermines our reliance on the HFA's direct economic impact upon the Fund as a basis for finding ERISA pre-emption nor precludes a determination that a state law's direct economic impact on ERISA plans is sufficient for a finding of pre-emption." *Id.* at 30.

Despite the apparent tension between the decision of the court of appeals in this case and comments made by other panels of the same circuit, neither rehearing nor rehearing *en banc* was sought. Instead, the petition for certiorari now before this Court ensued.

REASONS FOR DENYING THE WRIT

The Decision Below Does Not Deviate From The Mainstream of ERISA Pre-emption Law. *Travelers* In No Way Redeems From ERISA Pre-emption Direct State Taxation of Contributions Or Other Payments For Benefits Provided by An ERISA Plan.

The decision of the court of appeals in this case defines the law of ERISA pre-emption when the state law at issue *directly* affects an ERISA plan. The court of appeals determined that ERISA pre-empts the New York law in this case because that state enactment "imposes 'an immediate tax on payments and contributions which were intended to pay for participants' medical benefits . . . [and] thus directly affects the Fund in its principal role as an employee welfare benefit plan.'" *Axelrod*, 74 F.3d at 30, *reaffirming* 27 F.3d at 827. Neither this Court nor any other court has ever questioned the propriety of considering a state law's direct economic impact upon ERISA plans in adjudging whether the state enactment falls within the ambit of ERISA pre-emption. It is difficult to conceive of a state law that more clearly relates to ERISA plans than one which directly assesses contributions and other payments that fund the health care benefits provided to plan beneficiaries.

No Conflict With *Travelers*

The decision of the court of appeals in this case is perfectly compatible with established pre-emption jurisprudence, and nothing in the *Travelers* decision suggests otherwise. Indeed, in *Travelers* this Court expressly declined to abandon the principles enunciated in its prior ERISA pre-emption decisions and intimated its inclination to have found ERISA pre-emption if the state law at issue in *Travelers* had had a direct effect upon ERISA plans. *See Travelers*, 115 S. Ct. at 1683. ("That said, we do not hold today that ERISA pre-empts only direct regulation of ERISA plans . . . .").

Petitioners, when quoting and paraphrasing the teachings of *Travelers*, are constrained to mention the real focus of *Travelers* — a state law's "indirect economic effect" on ERISA plans. *See* Petition For Certiorari (hereinafter "Cert. Pet.") at 7-8. However, when forced to come to grips with the application of *Travelers* to the precise facts and issue in this case, petitioners have to resort to dissembling in order to concoct a conflict between *Travelers* and the decisions of the court of appeals in this case. They proffer an interpretation of *Travelers* that departs from its true holding. Petitioners argue, "In *Travelers*, this Court focused upon whether the surcharges' economic impact upon plans mandated benefits or structures, not upon whether the economic impact was directly or indirectly imposed upon plans." *See* Cert. Pet. at 9. *Travelers's* putative vitiation of the distinction between direct and indirect effects for ERISA pre-emption purposes somehow escaped the notice both of this Court in the *Travelers* decision itself and of every court that has examined the true scope and meaning of the *Travelers* decision. The Second Circuit has cogently identified the precise holding of *Travelers*: "Suffice it to say that a law's indirect economic effect on ERISA plans, in and of itself, generally will not trigger ERISA preemption." *New England Health Care*, 65 F.3d at 1030 (citations omitted). "The Court, though, left open or did not directly address a number of issues," *id.* at 1030, including the very issue presented for adjudication in this case: whether ERISA pre- empts a direct state tax on ERISA plan contributions and benefit payments.

Despite the precise and cabined holding of *Travelers*, petitioners suggest that it has produced a sea change in the law of pre-emption. They contend that *Travelers* stands for the proposition that any state law that has only an economic impact on ERISA plans is not pre-empted. *See* Cert. Pet. at 9. If petitioners' formulation, that for pre-emption purposes the distinction between direct and indirect effects should be vitiated, were to prevail, state laws regardless of whether they directly or indirectly affect ERISA plans would escape pre-emption, and there would be virtually no state law that would

yield to ERISA pre-emption — a result that would sap ERISA's pre-emption clause of all vitality.[7]

No Conflict With *Mackey*

Petitioners also attempt to fabricate a conflict where none exists between the decision below and *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988). The purported conflict rests upon an inaccurate interpretation of *Mackey's* holding. Petitioners contend that *Mackey* sustained against a claim of ERISA pre-emption "a generally applicable garnishment statute . . . despite its *direct* imposition of legal obligations upon an ERISA plan which resulted in economic costs and administrative burdens to the plan." *See* Cert. Pet. at 7 (emphasis supplied); *see also id.* at 10. But this Court in *Travelers* had a completely different understanding of its prior *Mackey* ruling. The *Travelers* Court noted that because *Mackey* had held that "a law authorizing an *indirect* source of administrative cost is not pre-empted, it should follow that a law operating as an indirect source of merely economic influence on administrative decisions, as here, should not suffice to trigger pre-emption either." *Travelers*, 115 S. Ct. at 1680 (emphasis supplied). *Mackey* adds nothing new or different to what *Travelers* supplied to the ERISA pre-emption calculus. Neither *Travelers* nor *Mackey* contains any principle, holding, or analysis that is at odds with the decision of the court of appeals in this case.

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[7] About the only state laws that would not escape pre-emption would be those that mandate plan decisions. Petitioners' formulation, however, is little more than a replay of approaches that have already been discredited, like limiting pre-emption to state laws that address the subjects of regulatory concern covered by ERISA — reporting, disclosure, fiduciary responsibility and the like — *see Ingersoll-Rand*, 498 U.S. at 137; *Shaw*, 463 U.S. at 98; or that specifically target ERISA plans, *Greater Wash. Bd. of Trade*, 506 U.S. at 129-130; *Pilot Life Ins. Co.*, 481 U.S. at 47.

No Intercircuit Conflict

Petitioners' penchant for false conflicts is not limited to decisions of this Court. Petitioners also play fast and loose with the decision of the Eighth Circuit in *Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3623 (Mar. 18, 1996) (U.S. No. 95-1153), again resorting to whatever it takes to invent a conflict. Petitioners assert that the state health provider tax in *Boyle* "imposes direct obligations upon plans to pay the tax [because] [i]t provides: 'all third party purchasers of health care services . . . must pay the transferred expense.'" *See* Cert. Pet. at 11 (citations omitted). Petitioners conveniently omit the full text of the statutory passthrough provision without any designation of the ellipsis. The statute actually reads: "A hospital, surgical center, pharmacy, or health care provider that is subject to a tax under Section 295.52 may transfer additional expense generated by section 295.52 obligations on to all third-party contracts for the purchase of health care services on behalf of a patient or consumer . . . . All third-party purchasers of health care services . . . must pay the transferred expense . . . *to the extent allowed under federal law*." *See Boyle*, 68 F.3d at 1098 (quoting Minn. Stat. § 295.52 (Supp. 1993)) (emphasis of pertinent part of provision omitted by petitioners). Unlike petitioners in this case, the Minnesota Legislature well understands the limits federal ERISA pre-emption law establishes for direct state exactions upon ERISA plans. Moreover, "the passthrough is voluntary," *id.* at 1103 n. 2, not a state-mandated, direct imposition but an indirect economic effect that arises when the targets of the state tax decide on occasion to pass the tax onto their customers. *Id.* at 1103-1104.

No Discord With Prevailing ERISA Pre-emption Law

Travelers did not produce a wholesale rewriting of the law of ERISA pre-emption. The "relate to" standard found in ERISA's express pre-emption clause is still the governing touchstone, although the *Travelers* Court disfavored a slavish embrace of its literal words, preferring instead an examination

of all the surrounding circumstances, including the objectives of the ERISA statute, the language of its pre-emption clause, and the context of its legislative passage, to discern the type of state law Congress intended to displace. 115 S. Ct. at 1677, 1680.

Application of this Court's instructions in *Travelers* leaves no doubt that the decision of the court of appeals in this case is in perfect harmony with the prevailing law of ERISA pre-emption. The court of appeals heeded the admonition of the *Travelers* Court, that Congressional intent is the guide to determine what state laws are supplanted by ERISA pre-emption. The court below adhered to the Congressional directive that state tax laws of general application are not immune from ERISA pre-emption. Indeed, ERISA's pre-emption provision contains a clear and unambiguous statement of Congressional intent to include within ERISA's pre-emptive embrace "any State tax law relating to employee benefit plans." 29 U.S.C.A. § 1144(b)(5)(B)(i) (West 1985).[8] The conference report explained that this statutory directive assured that "preemption is continued with respect to . . . any state tax law relating to employee benefit plans . . . ." H.R. CONF. REP. No. 984, 97th Cong., 2d Sess. 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4603. The comments on the Senate floor during its legislative passage reveal a Congressional understanding that ERISA pre-emption

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[8] When ERISA was first under legislative consideration in 1974, Congress underscored its objective of expansive pre-emption by rejecting a request by the Secretaries of Labor and Treasury to exclude state tax laws from ERISA pre-emption. *Northwest Airlines v. Roemer*, 603 F. Supp. 7, 12 (D. Minn. 1984). In 1983 Congress added a specific provision reaffirming that ERISA's pre-emption clause applied to state tax laws. 29 U.S.C.A. § 1144(b)(5)(B)(i) (West 1985). In light of this explicit Congressional design, "[t]he fact that a State tax law of general application is at issue is therefore not determinative of ERISA preemption." *Morgan Guar. Trust Co. v. Tax Appeals Tribunal*, 80 N.Y.2d 44, 51, 587 N.Y.S.2d 252, 256, 599 N.E.2d 656 (1992); *see also, E-Systems, Inc. v. Pogue*, 929 F.2d 1100, 1103 (5th Cir.), *cert. denied*, 502 U.S. 981 (1991).

would be triggered when state laws "relate to matters thoroughly regulated under ERISA or *impose tax liability on insurance premiums or benefits*." 128 CONG. REC. S26902 (daily ed. Oct. 1, 1982) (statement of Sen. Dole) (emphasis added).

There is a clear and unequivocal Congressional policy to shield ERISA plans from the destructive effects of state taxation. Congress has meticulously put into place throughout the Internal Revenue Code a national system of tax exemptions for ERISA plans. Contributions to ERISA plans are deductible and tax exempt. *See, e.g.*, 26 U.S.C.A. § 404 (West Supp. 1996) (pension and annuity plans); 26 U.S.C.A. §§ 162, 419, 419A (West Supp. 1996) (welfare benefit plans); 26 U.S.C.A. § 79 (West Supp. 1996) (employer-paid cost of life insurance); 26 U.S.C.A. § 106 (West Supp. 1996) (contributions to disability plans). Income earned through the investment of plans' assets is tax-free. *See, e.g.*, 26 U.S.C.A. §§ 501(a), 501(c) (West Supp. 1996) (pension and welfare plans).[9] Benefits received from welfare plans are tax-exempt. *See* 26 U.S.C.A. §§ 104, 105, 106 (West Supp. 1996) (accident and health benefits); 26 U.S.C.A. § 101 (West 1988) (death benefits); 26 U.S.C.A. § 129 (West Supp. 1996) (dependent care benefits). Benefits received from pension plans are tax-deferred; pension benefits are nontaxable while held by ERISA plans and only become taxable when ultimately received by the beneficiary. *See* 26 U.S.C.A. §§ 402, 403 (West Supp. 1996). ERISA's pre-emption clause preserves this uniform nationwide system of tax exemptions from the unsettling effects of conflicting state tax policy.

The court of appeals in this case applied the ordinary, commonsensical meaning of the statutory "relate to" standard and found that a state tax assessment levied upon employer

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[9] Of course, ERISA plans, like other employers, must pay payroll taxes (social security and federal unemployment taxes) attributable to individual workers in the plans' employ. *See infra pp.* 16-17.

and employee contributions to a medical center operated by an ERISA welfare plan to provide medical benefits to plan beneficiaries has a direct connection to the plan and is pre-empted not in its entirety but only insofar as it assesses those contributions. Indeed, every court that has addressed a state tax law that directly assesses plan contributions or plan benefits has found that the state enactment relates to ERISA plans and is pre-empted. *E-Systems, Inc. v. Pogue*, 929 F.2d 1100, 1103 (5th Cir.), *cert. denied*, 502 U.S. 981 (1991) (tax on health care benefits paid by plan); *General Motors Corp. v. California State Bd. of Equalization*, 815 F.2d 1305, 1309 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988) (tax computed on basis of health care benefits paid by plan); *Birdsong v. Olson*, 708 F. Supp. 792, 798-799, 801 (W.D. Tex. 1989), *appeal dismissed*, 901 F.2d 1270 (5th Cir. 1990) (tax on health care benefits paid by plan); *National Carriers' Conference Comm. v. Heffernan*, 454 F. Supp. 914, 917-18 (D. Conn 1978) (same).[10]

Congress understood the unique and fragile nature of employee benefit plans. It expressly included within the scope of

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[10] The only state tax laws that have survived ERISA pre-emption are business taxes imposed upon employers that include in the tax base contributions paid by employers to ERISA employee benefit plans, *see Thiokol Corp. v. Roberts*, 76 F.3d 751, 753-56 (6th Cir. 1996), and withholding and delinquency-garnishment procedures that assess not the plan but the beneficiary, *see Retirement Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1281 (9th Cir. 1990); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 556 (6th Cir. 1987); *see also Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) (monies subject to state garnishment had already been earmarked for judgment debtor so that application of state garnishment law did not affect amount of plan benefits due other beneficiaries); *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989) (same result for state escheat law). None of these state tax laws had any effect upon the amount of plan benefits or contributions, and thus their connection to ERISA plans was tenuous, remote, and peripheral — an insufficient nexus to trigger pre-emption. *Thiokol*, 76 F.3d at 754-55.

ERISA's pre-emption clause state tax exactions.[11] Anything less would have encouraged the various states to impose their individual tax levies upon the treasuries of ERISA plans. "The cost of the plan must therefore increase for the employer and/or employees or the benefits must be adjusted downwards to offset the tax bite. This is the type of impact Congress intended to avoid when it enacted the ERISA legislation." *E-Systems*, 929 F.2d at 1103; *see also Northwest Airlines*, 603 F. Supp. at 12; *National Carriers' Conference Comm.*, 454 F. Supp. at 917.

The Congressional treatment of state tax laws within the context of ERISA pre-emption exposes the fallacy of the interpretation of *Travelers* propounded by petitioners. There are two separate and distinct reasons why *Travelers* does not stand for the proposition that state laws having only an economic impact on ERISA plans are not pre-empted. First, there is nothing in the *Travelers* decision that supports this reading. The ruling of the *Travelers* Court was limited to indirect economic impacts of an insubstantial nature. *See* 115 S. Ct. at 1683. Second, tax laws by their very nature have as their necessary effect a purely economic impact on the affected taxpayer. A state tax by definition, therefore, affects or relates to an ERISA plan because the tax imposes an economic exaction that the plan must pay. If, as petitioners suggest, economic impact alone could never trigger pre-emption, the explicit Congressional directive to include state tax laws that relate to ERISA plans within the reach of ERISA pre-emption could never be fulfilled. Adoption of the suggestion urged by petitioners would effectively read the directive out of the statute, a result that would violate basic principles of statutory construction. *See Travelers*, 115 S. Ct. at 1679-80.

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[11] Tax laws by their very nature are an intrusive form of government regulation. They mandate nothing but the payment of money. However, "the power to tax involves the power to destroy." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

To shield state tax enactments from ERISA pre-emption would be inconsistent with the basic "objectives of the ERISA statute" — a key guide to defining the scope of ERISA pre-emption. *Id.* at 1677. Subjecting ERISA plans to the taxing powers of 50 separate and distinct jurisdictions would frustrate the Congressional objective of allowing ERISA plans to adopt nationally uniform administrative practices and interstate benefit packages, which the *Travelers* Court identified as one of the principal goals of ERISA pre-emption. *See Travelers,* 115 S. Ct. at 1677-78. State taxation of plan benefits and plan contributions would be incompatible with this Congressional objective. Benefits would vary from state to state depending upon the magnitude of each state's tax bite. This Congressional objective is implicated in this very case. The New York tax at issue in this case has no New Jersey counterpart, thus requiring the NYSA-ILA Medical & Clinical Services Fund to restructure its established method of administration to implement procedures for its New York medical clinics that differ from those of its New Jersey clinic. *See Axelrod,* 27 F.3d at 828. "Requirements under state law that force plans to change their traditional methods of administration or to adopt different methods on a state-by-state basis are features of state regulation that ERISA was designed to prevent." *Id.* at 828 (citations omitted).

The court of appeals had little difficulty dispelling the wolf cry repeated in the petition to this Court, *see* Cert. Pet. at 14-15, that pre-emption of the assessment on contributions would shield ERISA plans from numerous other forms of state regulation which result in increases in the cost of doing business, such as unemployment taxes, sales taxes, utility costs, wage laws, staffing requirements, nursing standards, or sanitary regulations involving the disposal of medical wastes. These exactions and regulations affect ERISA plans as they do all others in society in their roles as employers, purchasers, and regulated businesses. The tax on contributions, however, affects ERISA plans *qua* employee benefit plans; it affects the very activities and functions that make employee benefit plans what they are. "It does not touch the Fund only slightly on the outer limits of its plan activities; it affects the very operations

and functions that make the Fund what it is, a provider of medical, surgical, and hospital care to its participants and their beneficiaries." *Axelrod*, 27 F.3d at 827. It was hardly remarkable, then, for the court of appeals to have concluded that Congress intended the express pre-emption clause of ERISA to proscribe state assessments that sap the lifeblood of ERISA plans and directly hinder their essential functions.

Petitioners' real quarrel is with Congress's policy of pre-empting state tax exactions. But this disagreement is not a justiciable controversy. Congress in its wisdom enacted in ERISA a pre-emption provision that deliberately protects ERISA plans from rapacious state taxes and other revenue-enhancing regulatory schemes. It is not the function of the Judicial Branch to override the policy decisions of the Legislative Branch. If Congressional policy is to be revamped, recourse must be sought in the halls of Congress, not in the chambers of this court.

The court of appeals in this case, as did every other tribunal that has entertained the same question, applied established precedent to invalidate the immediate and direct imposition of a state tax levy on contributions to, and benefit payments of, an ERISA plan. The decision below is perfectly consistent with the analytical methodology adopted by this Court in *Travelers*, since it gives effect to Congressional intent, the touchstone for ERISA pre-emption. The decision below rests squarely upon a clear and explicit Congressional policy to pre-empt state tax impositions on ERISA plan contributions and benefits and to discourage any state interference with nationally uniform administrative procedures and benefit packages. The decision below, therefore, is in perfect harmony with established principles of ERISA pre-emption law and should not be disturbed.

Conclusion

This case presents no conflict with Supreme Court precedent, no discord among the circuits, no departure from the prevailing law of ERISA pre-emption. Petitioners may quibble with the underlying Congressional policy that led to the enactment of an ERISA pre-emption provision that supplants direct state taxation of ERISA plans, but their dissatisfaction is not a valid ground for review by this Court of a court of appeals decision that complies with the directive embodied in established ERISA pre-emption jurisprudence as expressed by this Court in a long line of cases culminating in the recent *Travelers* decision — to give effect to the will of Congress in ERISA pre-emption cases. The petition for certiorari should be denied.

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